Chapter 2

State Support for Religions: European Regulation

Françoise Curtit and Anne Fornerod[1]

The issue of public funding for religions in Europe deals mainly with the various mechanisms put in place by domestic legal systems. However, in addition to financial relationships between the State and religions, we should take into account the European level as a regulatory framework. European Union policy, as well as European Court of Human Rights case law, could indeed affect state support for religions. The first section of this paper will examine European Union tax policy on funding religious organizations, while the second section will analyze the case law of the European Court of Human Rights in this field.

European Union Tax Policy and Financial Relationships between States and Religions

Religious issues do not fall within European Union competence and in this respect Member State sovereignty continues to prevail.[2] In various areas, European Union law nevertheless provides exemptions from rules of general applicability to preserve the existing domestic provisions relating to the organizational autonomy of religious communities and to their role in society (processing of sensitive data, labour law for organizations with an ethos based on religion or belief, ritual slaughter …). In these cases, religion is clearly distinguishable from economic activities and requires protection against market forces or economic regulation. On the other hand, if religious organizations are to be considered as serving economic purposes, they are subject to the same rules and principles as any other entities, particularly as regards public funding and state aid.

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[1] UMR DRES 7354 - Droits et religions, CNRS / University of Strasbourg.

[2] See Article 17 § 1 of the Treaty on the Functioning of the European Union [30.03.2010] *OJ* C 83: 'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.'

In this context, European Union regulation of Member States' tax policies could affect state support for religions, and we intend to show how European Union tax rules and the powers of investigation of the European Commission could interfere in, and even influence, financial relationships between tates and religions.

The European Union's Role in Tax Coordination

Tax policy itself falls mainly within the competence of Member States, which may provide support for religions, in particular by granting them specific tax reliefs. However, the European Union plays a subsidiary role of tax coordination (and harmonization for value added tax) to maintain the fairness and balance of Member States' tax systems. In fact, the European Commission checks that national tax systems are compatible not only with each other, but also with the aims of the treaties, by ensuring that taxation (or non-taxation) does not create an obstacle to the free movement of goods and the free supply of services within the internal market. European Union law contains very few legal provisions relating to tax measures for religious activities and institutions.

Firstly, one could mention Article 103 of Regulation 1186/2009[3], which provides that documentation for religious events (leaflets, books, magazines …) shall be free of import duties – which clearly has a very minor impact on funding for religions.

Secondly, and more relevant to our subject, the Value Added Tax (VAT) Directive 2006/112[4] obliges a Member State to tax supplies of goods and services as long as no specific exemption is provided. Public interest exemptions are strictly listed under Articles 132 and 133, relating in particular to welfare, social, medical or educational activities undertaken by

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[3] Council Regulation (EC) 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty [10.12.2009] *OJ* L324, p. 23.

[4] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [11.12.2006] *OJ* L347, p. 1.

bodies governed by public law and by non-profit organizations. VAT has to be harmonized at European Union level in order to ensure that goods and services can move freely and without hindrance between Member States, and exemptions constitute exceptions which must be strictly interpreted[5]. The impact of this directive and the 'Europeanization' of tax policy will be discussed further below.

European Union Investigative Power and Infringement Procedures: Recent Cases

The European Union single market is the cornerstone of European integration. As guardian of the treaties, the European Commission ensures that competition is not distorted and promotes the free movement of people, goods, services and capital. The Commission could, for example, control if state aid or taxation/non-taxation of activities are anti-competitive. To this end, the Commission has investigative powers, wielded at its own initiative or in response to a government request or an individual complainant. If the Commission detects a failure to comply with European Union law, it may initiate an infringement procedure (Article 258 of the Treaty on the Functioning of the European Union) comprising several stages. At the beginning, the Commission sends the Member State concerned a letter of formal notice inviting it to submit its observations within two months and most differences of opinion are settled during this first stage. Otherwise, the Commission may issue a reasoned opinion, allowing the Member State an additional two-month period within which to comply. At the end, if the Member State fails to conform to European Union law, the Commission can refer the case to the Court of Justice of the European Union. Up to now, no case law has been brought before the Court relating to domestic tax systems as applied to churches and religious organizations. The Commission has recently opened a handful of investigations and proceedings in this area, involving Spain, Italy and, more recently, Denmark. Here, we will present the most significant of these.

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[5] See case C–284/03 *Temco Europe* [2004] ECR I–0000, pt 17.

VAT exemption in favour of the Catholic Church in Spain

The European Commission decided in December 2005 to issue a formal request to Spain to amend value added tax treatment of supplies of goods made to the Catholic Church (for example Episcopal Conference, dioceses, parishes and other territorial constituencies, orders and religious congregations …). Spain maintains that the Agreement between the Spanish State and the Holy See on Economic Affairs of 3 January 1979[6], Article 4 1. B), obliges it to exempt from VAT certain supplies of goods (imports and acquisitions of movables and immovables) to the Catholic Church.[7] Such an exemption is not authorized under the European Union VAT system (according to the VAT Directive), even if the State makes a positive adjustment to the revenue. The Commission pointed out that the second paragraph of Article 307 of the European Community Treaty[8] obliges Spain – to the extent that the agreement is not compatible with the European Community Treaty – to 'take all appropriate steps to eliminate the incompatibilities established. This would even, following the case law of the European Court of Justice, include denunciation of the Agreement'.[9]

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[6] Instrumento de ratificación del Acuerdo entre el Estado español y la Santa Sede sobre asuntos económicos, firmado en la Ciudad del Vaticano el 3 de enero de 1979 [15.12.1979] *BOE* 300, p. 28782.

[7] Press release IP/05/1620 of 16 December 2005, 'VAT – Commission asks Spain to amend treatment of supplies of goods made to the Catholic Church'.

[8] Now, Article 351 TFEU: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude …'

[9] Press release IP/05/1620, *op. cit.*

The Spanish Episcopal Conference and the Spanish government started negotiations and finally reached an agreement on funding the Church: from 1 January 2007, VAT exemptions were no longer to apply to the operations of the Catholic Church (except as provided by European Union tax law). The Commission had made it clear that this does not prevent Spain from paying financial compensation to the Catholic Church in return for VAT that the Church has to pay to the Spanish tax authorities.[10] In this regard, the Spanish Government chose to revise the state's tax allocation to the Catholic Church from 0.52 per cent to 0.70 per cent of the entire income tax revenue received from private individuals.[11]

ICIO exemption in favour of the Catholic Church in Spain

In 2007, a second investigation was initiated against Spain to review the Catholic Church's exemption from the 'Tax on construction, installation and repairs' (*Impuesto sobre construcciones, instalaciones y obras*, ICIO),[12] a municipal tax on building works requiring permits. This exemption was granted by a ministerial order of 5 June 2001,[13] a legal provision also pursuant to Article 4 1. B) of the Agreement of 3 January 1979 between the Spanish State and the Holy See.

This exemption also applied where constructions, installations or repairs were related to activities having nothing to do with worship, sometimes of a purely commercial nature. Here, the Church could be in competition with economic entities, (companies …) which had to pay

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[10] *Ibidem*.

[11] Ley 42/2006, de 28 de diciembre, de Presupuestos Generales del Estado para el año 2007. Disposición adicional decimoctava. Revisión del sistema de asignación tributaria a la Iglesia Católica [29.12.2006] *BOE* 311.

[12] See Parliamentary questions: E–2578/06 of 12 June 2006 [30.12.2006] *OJ* C329; E–0829/07 of 20 February 2007 [5.12.2007] *OJ* C293; E–0774/08 of 18 February 2008 [13.11.2008] *OJ* C291.

[13] Orden de 5 de junio de 2001 por la que se aclara la inclusión del Impuesto sobre Construcciones, Instalaciones y Obras en la letra B) del apartado 1 del artículo IV del Acuerdo entre el Estado Español y la Santa Sede sobre asuntos económicos, de 3 de enero de 1979 [16.06.2001] *BOE* 144, p. 21427.

tax and enjoyed no exemption. As the status of the supplier determines whether the activity is taxable or non-taxable, it may create distortions of competition. The Commission considered that this exemption was therefore a form of state aid,[14] incompatible with the common market since it distorts or falsifies competition, favouring bodies of the Catholic Church and being prejudicial to other Spanish or European businesses carrying out buildings or repairs for similar purposes.[15]

In 2009, the Spanish Government amended the legislation to eliminate any incompatibility between this tax exemption and European Union state aid rules.[16] The Spanish proposal consisted in limiting the scope of the ICIO exemption to real estate which is clearly used for religious purposes and is thus unrelated to an economic activity. For this reason, the European Commission considered that the Spanish proposal has satisfied its request, since it only covers buildings the use of which is outside the scope of rules on state aid.[17]

Both cases in Spain have thereby been closed, as have other more recent cases in Italy. Acting upon complaints in relation to undertakings received from 2006, the European Commission sent several requests for information to the Italian authorities and in 2010 finally opened formal investigation proceedings related to two types of tax exemption.

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[14] Article 107 § 1 TFUE: '1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

[15] Parliamentary question E–2578/06 of 12 June 2006 [30.12.2006] *OJ* C329.

[16] Orden EHA/2814/2009, de 15 de octubre, por la que se modifica la Orden de 5 de junio de 2001, por la que se aclara la inclusión del Impuesto sobre Construcciones, Instalaciones y Obras en la letra B) del apartado 1 del artículo IV del Acuerdo entre el Estado Español y la Santa Sede sobre asuntos económicos, de 3 de enero de 1979 [21.10.2009] *BOE* 254, p. 88046.

[17] Parliamentary questions P–1628/2009 of 15 April 2009 [13.07.2010] *OJ* C189.

Tax exemption from the municipal tax on real estate in Italy[18]

The first procedure relates to a municipal tax (*Imposta comunale sugli immobili*, ICI) exemption, which is granted on real estate used by non-commercial entities which exclusively fulfil specific purposes: activities such as social assistance, welfare, health … and religious and worship activities.[19] An entity can enjoy this exemption only if its commercial activities are non-prevalent: if they are neither marginal, nor directly related to the activity of worship, it will not benefit from the exemption. A circular from the Finance Ministry dated 26 January 2009[20] states that ecclesiastical organizations legally recognized according to the Lateran Treaty or agreements between the Italian State and other denominations are included among private, non-commercial entities.

The Commission considers that this tax exemption could constitute illegal state aid and therefore distort competition, because it constitutes an advantage for these organizations in comparison with commercial entities which provide the same activity. For instance, health-care or accommodation services provided by ecclesiastic institutions are in competition with similar services offered by economic operators.[21] Furthermore, the Commission considers that non-commercial entities may perform, in certain cases, economic activities and '[a]t this stage of the procedure, [it] also considers that the criteria used by the *Circolare* in order to exclude

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[18] State aid C 26/10 (ex NN 43/10) – Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes. Invitation to submit comments pursuant to Article 108 § 2 of the Treaty on the Functioning of the European Union (text with EEA relevance) (2010/C 348/11), [21.12.2010] *OJ* C348, p. 17.

[19] Decreto legislativo n. 504, 30 dicembre 1992, Article 7 § 1 i), [30.12.1992], *G.U.* 305, suppl. ord.

[20] Circolare 26 gennaio 2009, n. 2, del Ministero delle Finanze, Imposta comunale sugli immobili (ICI), Article 7, comma 1, lettera i), del D. Lgs. 30 dicembre 1992, n. 504.

[21] State aid C 26/10, *op. cit.*, pt 54.

the *commercial nature* (under Italian law) of the activities listed in Article 7 i) cannot exclude the *economic nature* (under European competition law) of these activities'.[22]

In early 2012, the ICI was replaced by the IMU (*Imposta municipale unitaria*), and the Monti government drafted an amendment[23] which provides that, in case of mixed commercial and non-profit use of the same building, the exemption will be strictly limited to the fraction of the property in which non-commercial activities take place. A declaration mechanism is also planned so as to identify the proportional relationship between commercial and non-commercial activities performed within the same building.

The European Commission has therefore closed its investigation, considering that, under these limitations, the IMU is in line with European Union state aid rules.[24]

Italian Unified Law on income tax: ecclesiastic institutions can never lose their non-commercial status[25]

As part of the same procedure, the Commission also investigated Article 149 4) of the Italian Unified Law on Income Tax (*Testo unico delle imposte sui redditi*, TUIR)[26] which provides favourable tax treatment for ecclesiastic institutions and amateur sports clubs. This law lays down the tax advantages applicable to non-commercial entities and identifies the

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[22] State aid C 26/10, *op. cit.*, pt 38 [emphasis added].

[23] Decreto-legge 24 gennaio 2012, n. 1, coordinato con la legge di conversione 24 marzo 2012, n. 27, Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitivita, Article 91–bis, [24.3.2012] *G.U.* 71, suppl. ord. 53.

[24] Press release IP/12/1412 of 19 December 2012, 'State aid : Commission finds Italian ICI real estate tax exemptions for non-commercial entities incompatible and clears amended exemptions under new IMU law'.

[25] Press release IP10/1319 of 12 October 2010, 'State aid: Commission opens probe into preferential real estate tax regime for non commercial entities in Italy'.

[26] Decreto del Presidente della Repubblica, 22 dicembre 1986, n. 917 – Approvazione del Testo unico delle imposte sui redditi [31.12.1986] *G.U.* 302, (Article 149 was introduced in 1998).

conditions that can lead to the loss of the 'non-commercial status' of an entity. The provision of Article 149 4) appeared to exclude the application of the rules concerning the loss of 'non-commercial status' for ecclesiastic institutions with a civil status, even if they carry out commercial activities. 'As regards Article 149 4) TUIR, at this stage the Commission considers that the provision constitutes *prima facie* a selective measure, since the possibility to maintain the non-commercial status even when they would otherwise no longer be considered as non-commercial entities is granted only to ecclesiastic institutions and to amateur sport clubs.'[27]

But here again, the European Commission has closed its investigation. It had finally revealed 'that the controls carried out by the competent authorities include these entities and that there is no system of "perpetual non-commercial status"'.[28]

VAT exemption for charitable and non-profit making associations' supplies in Denmark

Finally, mention should be made of a last, pending case related to Denmark. Danish authorities exempt from VAT all supplies carried out by charities or other non-profit associations (including religious organizations) in connection with their running businesses, as well as goods supplied by second-hand shops. In 2008, the European Commission sent a formal notice to Denmark[29] and stated that such a general exemption goes beyond what is allowed under Article 132 of the VAT Directive, which contains a detailed, restrictive description of the activities that can be exempted, as well as certain conditions related to the exemption. In 2010, the procedure continues as a reasoned opinion and the Commission has

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[27] State aid C 26/10, *op. cit.*, pt 56.

[28] Press release IP/12/1412, *op. cit.*

[29] Press release IP/10/90 of 28 January 2010, 'VAT – Commission pursues infringement proceedings against Denmark regarding VAT exemptions'.

formally requested Denmark to change the law regarding the application of these exemptions. It is a recent, ongoing investigation and further information should be forthcoming.

Towards a New Funding Model in the Member States?

We will try to draw some conclusions from these few infringement cases, in order to assess factors involved in the emerging patterns of state support for religions.

Does the European Union interfere in the financial relationships between States and religions?

The European Union acts strictly within the limits of its competences conferred by the treaties (single market, competition, state aid …) and does not want to deal more precisely with state funding of religious institutions.[30] Its intervention on the matter mainly involves checking the implementation of European Union tax law within domestic legislation. Moreover, without needing to refer to the Court of Justice, at least for religion-related cases, the Commission succeeded in amending Spanish and Italian tax law, and perhaps soon Danish law. Therefore, we can say that the European Union does interfere in financial relationships between States and religions, at least as regards tax policy, which represents only one part of public support that they receive.

A 'banalization' of religious organizations?

We can identify two different tax policy approaches among the partners involved. On the one hand, Member States could apply differentiated treatment between religious and non-religious *organizations* (Catholic Church in Spain, ecclesiastic institutions in Italy) or

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[30] On the privileged situation of the Catholic Church relating to tax exemption in Spain, the Commission responded: ' … the Commission would point out that, as Community law stands at present, the financing of religious institutions falls entirely within the sphere of competence of the Member States': Parliamentary question P–3773/2002 of 24 January 2003 [10.07.2003] *OJ* C161E, p. 142.

between commercial and non-commercial *status* (non-commercial entities in Italy, non-profit associations in Denmark).

On the other hand, European Union authorities focus their approach on the *activities*,[31] regardless of the type of organization that carries them out. The justification for the exemption here lies in the nature of the tasks, and the status of the supplier cannot determine in itself whether the activity is taxable or not. In this regard, the European Union distinguishes more specifically between the *economic* nature and the *commercial* nature of activities[32] and considers that non-commercial entities – and among them religious organizations – may perform economic activities in various areas (health care, housing, education …). They are therefore in competition with other operators offering the same services and fall within the scope of state aid rules. Under this broad interpretation and according to the case law provided by the European Court of Justice, 'any activity consisting in offering goods and services on a given market' is an economic activity.[33]

The European Union plays its role of tax coordination and harmonization in accordance with the primacy given to single market and competition rules. In this context, the same law applies to all legal entities (profit-making companies, non-profit organizations …): religious organizations are economic players like any others. As providers of social services, but also as institutions *per se*, religions are losing their specificities, at least regarding taxation: if the Catholic Church is subject to special rules pursuant to an international agreement (Concordat), this agreement has to be amended (see *supra*). In this matter, as in other areas (employment

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[31] See Article 132 of the VAT Directive 2006/112: 'Member States shall exempt the following transactions …' [emphasis added].

[32] See *supra*, concerning the ICI tax in Italy.

[33] See case C–475/99 *Ambulanz Glöckner* [2001] ECR I–8089, pt 19.

status of ministers of religion, denominational schools …), the prevailing market logic is progressively leading to a 'banalization' of religious organizations.

The European Union's aim is not to standardize national systems of financing and taxation, but European Union law creates a legal framework, an economic context to which Member States have to adapt their domestic legislation. In this light, in December 2010 the European Commission issued a Green Paper on VAT,[34] proposing a comprehensive reform of the VAT system, because the existence of numerous options and derogations for Member States under European Union VAT law was leading to divergent rules across the European Union and may be an obstacle to the better functioning of the single market. There is a need to review these exemptions, and to 'reform the VAT rules in a "single market-friendly way"'.[35] After a consultation phase, the Commission's decision on such harmonization could be a new step towards fiscal integration into the European Union … and the disappearance of disparities within Member States.

'*Coping mechanisms'*

In this European legal context, various tax exceptions for operations of a purely religious nature remain possible in Member States, but only if they can strictly be considered as activities of social utility or public benefit which cannot distort competition.

However, this binding framework does not prevent any Member State from adapting its own legislation, for instance by implementing a tax refund mechanism (e.g. returning VAT to religious organizations or charities …). Various VAT compensation systems are currently in operation in Members States (Austria, Denmark, Finland, France, Netherlands, Portugal,

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[34] *Green Paper on the future of VAT. Towards a simpler, more robust and efficient VAT system* COM (2010) 695 final.

[35] *Ibidem*, p. 5.

Sweden and UK) for certain public bodies or non-profit organizations.[36] As regards religious organizations, Portugal, for example, has chosen to operate a VAT refund mechanism, funded by the State, compensating various entities, including the Catholic Church. In 1991, the European Commission started an infringement procedure against Portugal related to VAT exemption for the delivery of objects of worship and for construction, maintenance and repairs to buildings belonging to the Catholic Church, intended exclusively for worship.[37] The Commission recognized that these were not 'economic activities', but it was nevertheless a breach of the VAT Directive. The Portuguese Government then solved this problem by passing a law stating that the Catholic Church would receive in return, every year, a subsidy equivalent to the amount of VAT paid. In the United Kingdom, the Listed Places of Worship Grant Scheme, provides grants towards the VAT incurred in making repairs and carrying out necessary alterations to listed buildings mainly used for public worship. Places of worship 'listed' by Government as architecturally important benefit from the refund of the difference between five per cent and the actual amount spent on VAT on eligible repairs and maintenance.[38]

Several reports[39] suggest extending the VAT refund scheme throughout the European Union, especially for charities. This recommendation could be extended to the activities of

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[36] Copenhagen Economics (2011), *VAT in the public sector and exemptions in the public interest: final report for Taxud*, March 1, http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/vat_public_sector.pdf, accessed 4 February 2013.

[37] Decreto lei 20/90 de 13 de Janeiro [13.01.1990] *D.R.* 1 serie 11, p. 199.

[38] Cranmer, F., *Paying the piper? Public financing of religion in a secular society*, p. ??

[39] Copenhagen Economics, *VAT in the public sector*, *op. cit*. ISOBRO, *Denmark – VAT Compensation Scheme for Charities* 2006, 28 February 2007, see summary: http://www.ictr.ie/files/Danish Vat Compensation Scheme Summary - Feb 2007.pdf, accessed 4 February 2013.

religious organizations … and perhaps for other categories of taxes, as far as it does not lead to competition distortion.

'Coping mechanisms' can thus be implemented in the Member States to ensure compliance between national practices and European Union law. This superposition of technical rules and complex mechanisms could nevertheless be an additional obstacle to an even greater transparency required in the financial relationships between States and religions. In this respect, European Union law and domestic legislation have to provide clear and reliable tax rules and selection criteria.

A market–oriented approach for emerging practices in state funding for religions

Public funding for religions is under pressure on all sides and, in a context of secularization of societies, growing pluralism … and economic crisis, it may give rise to contestation within the States: 'privileges' are no longer applicable to religions, nor *among* religions. In Italy for instance, in summer 2011, a growing number of people were criticizing tax breaks given to the Catholic Church, including via an Internet campaign. Protesters were asking for numerous exemptions given to the Church to be reviewed and proposing abolition of the *otto per mille* (part of annual income tax revenue, paid to an organized religion or to a social assistance project run by the Italian State, mainly benefiting the Catholic Church). Supporters said that the tax breaks were justified, because the Catholic Church plays an important role in social welfare, but the debate is far from over.[40] In Greece, public controversy emerged in September 2011, as the Orthodox Church appeared to be largely exempt from a new property

[40] Nasi, Margherita, 'Italie: les privilèges fiscaux de l'Église en question', *Libération*, 30 August 2011. And see Facebook *Vaticano pagaci tu la manovra finanziaria* and *Ma quali privilegi e ICI? La Chiesa le tasse le paga!*

tax implemented to achieve Greece's austerity targets.[41] Here again, religious organizations are asked to be one among many economic players in a market society.

State funding for religions goes far beyond tax policy issues, and many other direct and indirect funding mechanisms are involved in Member States. Nevertheless, a market–oriented approach could also be applied in this larger context and on a national level, as an explanatory framework for legal adjustments, but also emerging practices and ongoing discussions on the 'good standards' of state support for religions.

Tax Policy and Financial Relationships between States and Religions before the European Court of Human Rights

Addressing the issue of state support for religions in the light of the European Convention of Human Rights raises at the outset one obvious question: does this matter fall within the scope of the Convention? No doubt that the European Court is competent for applications pertaining to freedom of religion, guaranteed by Article 9 § 1. Moreover, and despite the margin of appreciation often granted to Member States to regulate religious matters within national borders,[42] the Strasbourg Court no longer hesitates to take a stand against the national system of relationships between States and denominational groups and to align them with the requirements of the European Convention of Human Rights.[43]

In addition, state support takes on several forms, such as the use of tax instruments or direct or indirect funding through subsidies. An in-depth analysis shows that the main – and

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[41] Salles, Alain, 'Orthodox Church appears to be exempt from austerity measures', *Guardian Weekly*, 4 October 2011.

[42] See Nigro, Raffaella (2010), 'The margin of appreciation doctrine and the case-law of the European Court of human rights on the Islamic veil', *Human rights review*, p. 531.

[43] See for example, *Sviato-Mykhaïlivska Parafiya v. Ukraine*, No. 77703/01 (ECHR, 14 June 2007), § 114 and § 121, and *Lang v. Autriche*, No. 28648/03 (ECHR, 19 March 2009), § 24–5.

even the sole – aspect dealt with by the Court is the tax legislation of the various domestic systems of state support for religions. As the European Court of Human Rights itself points out in its case law, the power of taxation in general is expressly recognized by the Convention and is ascribed to the State by Article 1 of Protocol No. 1,[44] concerning the protection of property.[45] The relevant provisions lie in section 2 of this article, allowing the States to 'secure the payment of taxes'.

The European Court has a long tradition of dealing with tax issues related to religions: decisions have been regularly issued since the 1980s and they will require some elucidation in the context of the sample under study here. This sample comprises only sixteen cases, including four judgments and in the main decisions on admissibility[46]. It should be noted that an overwhelming majority of applications have been declared inadmissible. The only three cases that confirmed a violation of the Convention[47] are rather disappointing in that the

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[44] Precisely, this provides that: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

[45] See Commission (dec.), *C. v. the United Kingdom*, No. 10358/83 (ECHR, 15 December 1983); Court (dec.), *Alujer Fernandez and Caballero Garcia v. Spain*, No. 53072/99 (ECHR, 14 June 2001).

[46] See the list at the end of this paper.

[47] *Darby v. Sweden*, No. 11581/85 (ECHR, 23 October 1990); *Jehovah's witnesses v. France*, No. 8916/05 (ECHR, 30 June 2011). In the *Darby* case, the Court concludes that there was a violation of Article 14 combined with Article 1 Protocol 1, but without carrying out a real examination of the claim under Article 9. In addition, the violation relies on a lack of legitimate aim pursued by the Swedish legislation, the scope of which is very limited. In the same vein, the recent *Association of Jehovah's Witnesses* case led to a decision confirming a violation of Article 9, but only because of the gifts received by the association being taxed under a law that was

religious tax systems in question are either only a secondary consideration or are very much linked to national legislation. This limited amount of cases could be an illustration of the specificity of case law related to taxation based on Article 1 of Protocol No. 1. Indeed, most of the applications highlight the procedural aspects of national taxation processes, leaving limited space for Article 1 of Protocol No. 1 taken in conjunction with other substantive rights – opposed to procedural ones – of the Convention.[48]

Concerning specifically the combining of provisions related to religious issues – mainly Article 9 – and Article 1 of Protocol No. 1, no real leading case can be found which would provide a framework for case law in this field. Nevertheless, what emerges from this small number of cases is the Court's amazingly steadfast position, and its guidelines are worth examining. It seems that unshakeable protection is granted to State sovereignty in taxation and, furthermore, that the financial dimension of the system of Church–State relationships benefits from an important stability.

Tax System and Religious Freedom before the European Court: the Reduced Protection of Freedom of Religion

The tax system applicable to religious groups seems to offer nearly absolute power for state authorities to decide on how they should be taxed. In comparison, freedom of religion, negative or positive, seems to benefit from very limited protection and does so in several respects and under varying circumstances.

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too imprecise. In the *Wasmuth v. Germany* case (No. 12884/03, ECHR 17 February 2011), it is without doubt the difficulties surrounding negative freedom of religion raised by the application which eventually justified an examination of the merits.

[48] See Berger, Vincent (2010), 'La jurisprudence de la Cour européenne des droits de l'homme et le droit fiscal', *Droit fiscal*, No. 24, p. 367; Çoban, Ali Riza (2004), *Protection of property rights within the European Convention on Human Rights* (Aldershot: Ashgate), p. 218.

The impression of reduced protection of freedom of religion firstly results from the Court very exceptionally accepting to consider taxation itself as interference in religious freedom, while freely admitting that taxation amounts to interference in Article 1 of Protocol No. 1. Indeed, the Court seems much more cautious when religious taxation is at stake or when the applicants claim that taxation has an impact on their religious freedom. The impression prevails that taxation and the free exercise of freedom of religion are two separate processes, largely disconnected. This starts with the fact that tax cannot be characterized as a 'manifestation of one's religion'[49] and that 'the obligation to pay taxes is a general one which has no specific conscientious implications in itself'.[50] As a consequence, already in 1983 in the *C. v. United Kingdom* case, the Commission and then regularly the Court have stated that 'Article 9 does not confer on the applicant the right to refuse, on the basis of his convictions to abide by [tax] legislation'.[51] Moreover, as considered in the *Iglesia Bautista 'El Salvador' and José Aquilino Ortega Moratilla v. Spain* case,[52] 'the right to freedom of religion by no means implies that churches or their adherents must be granted a different tax status from that of other taxpayers'. In addition, case law related to '*prima facie* neutral legislation' applies

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[49] Court (dec.), *Bruno v. Sweden*, No. 32196/96 (ECHR, 28 August 2001).

[50] *Iglesia Bautista « El Salvador » and José Aquilino Ortega Moratilla v. Spain*, No. 17522/90 (ECHR, 11 January 1992).

[51] Commission (dec.), *C. v. the United Kingdom*, No. 10358/83 (ECHR, 15 December 1983); Commission (dec.), *Hubaux v. Belgium*, No. 11088/84 (ECHR, 9 May 1988).

[52] *Iglesia Bautista « El Salvador » and José Aquilino Ortega Moratilla v. Spain*, *op. cit.* The applicants argued that levying property tax infringes their freedom of religion set forth in Article 9. The commission holds however that it 'fails to see how a right to exemption of places of worship from all forms of taxation can be derived from Article 9 of the Convention'.

here, as is proven in the decision *Skugar and others v. Russia.*[53] The applicants complained that they had been assigned taxpayer numbers which were incompatible with their religious beliefs.[54] The Court very clearly answered that 'general legislation which applies on a neutral basis without any link whatsoever with an applicant's personal beliefs cannot in principle be regarded as an interference with his or her rights under Article 9 of the Convention'.

The sole possible evolution in case law linking taxation and freedom of religion could arise from situations in which taxation leads to material consequences in that it deprives the applicants of the concrete conditions of worship. As mentioned before, in the *Iglesia Bautista 'El Salvador' and José Aquilino Ortega Moratilla v. Spain* case,[55] the applicants argued that levying property tax infringes their freedom of religion set forth in Article 9. The Commission holds however that it 'fails to see how a right to exemption of places of worship from all forms of taxation can be derived from Article 9 of the Convention. It considers that the right to freedom of religion by no means implies that churches or their adherents must be granted a different tax status from that of other taxpayers'.

It should be noticed that, in this case, the application was declared inadmissible by a majority only, suggesting that some disagreement had occurred among the judges about the eventual decision. Since the Court does not provide dissenting opinions at the admissibility stage, it is difficult to know the underlying reasoning. In the 1992 case, the complaint was three-fold and, since both of the applicants' arguments may be considered to be well-established case law, one could suggest that the disagreement within the Commission could

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[53] Court (dec.), *Skugar and others v. Russia*, No. 40010/04 (ECHR, 3 December 2009). See also *Vergos v. Greece*, No. 65501/01 (ECHR, 24 September 2004), § 40.

[54] In the case at hand, the number in question contained three times '6' and therefore corresponded to the image of the beast in Saint John's apocalypse.

[55] *Iglesia Bautista « El Salvador » and José Aquilino Ortega Moratilla v. Spain*, *op. cit.*

be explained by the alleged unequal treatment of the Catholic Church, which would infringe Article 14 in conjunction with Article 9. The intransigence of the Court gave way only recently in the 2011 *Jehovah's Witnesses v. France* case, which throws new light on the 1992 Spanish case. Indeed, although the eventual solution did not deal with this point, it seems that for the first time the Court recognizes in unambiguous terms that 'the taxation imposed on the applicant had threatened, if not severely hindered, the internal organization and its functioning, given that, in particular, places of worship were targeted' (§ 53).[56]

In addition, one observes an unequal balance between freedom of religion and religious organizations' taxation rights. Although the Court commonly holds that no-one should be constrained to be involved in religious activities against one's will, it remains shy when it comes to questioning the tax system.

The case *Bruno v. Sweden*[57] could have us think and believe in the prospect of protection of the freedom of religion through Article 9 § 1 in taxation litigation. Indeed, in its reasoning, the Court includes the duty to pay church tax within the constraints of being involved in religious activities against one's will. However, the Court combines this statement with the nuance that it is 'in certain circumstances ' … a condition that was not met in this case. The applicant claimed that 'the levying of church tax on him, who is not a member of the Church of Sweden, violated his freedom of religion as protected by Article 9 of the Convention'. His complaint was more precisely directed at the administration of burials, which the Church of Sweden is entrusted with. It should be specified that the sums levied by the Church of Sweden – at the time of application – were partly justified by the carrying out of certain tasks in the common interest, by the Church instead of public authorities. Non-members of the Church might be partially exempted from this tax. In addition, in this case, the reference to the *Darby*

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[56] *Jehovah's witnesses v. France*, No. 8916/05 (ECHR, 30 June 2011).

[57] Court (dec.), *Bruno v. Sweden*, No. 32196/96 (ECHR, 28 August 2001).

v. Sweden is only half convincing in that, although the Court concluded here that there was a violation of Article 14 taken together with Article 1 of Protocol No. 1, it drew this conclusion irrespectively of the religious background of the case. The impugned discrimination came from the illegitimate aim of the distinction between residents and non-residents in Sweden, and not from the distinction between members and non-members of the Church of Sweden. The applicant worked in Sweden, but lived in Finland.

The protection of freedom of religion rests at first sight on the principle according to which 'a Church tax regime is not incompatible with the individual's freedom of religion so long as he or she is free to leave the Church in question'.[58] Nevertheless, the formalities of departure depend on the conditions fixed by the State. But this position is an old one, as the Commission already held in 1984 that 'a requirement to pay a tax for belonging to a specific Church is not an interference with the exercise of freedom of religion where the law allows individuals to leave the Church'.[59] It shows that from the moment a case deals with the heart of religious freedom, the Court could modify its position. The case *Sukyo Mahikari v. France* also dealt with the taxation of manual gifts, but, unlike the *Jehovah's Witnesses v. France case*, the basis of taxation did not prevent the association from practising worship by depriving it of its places of worship.[60]

Negative freedom of religion is equally dealt with by the Court within this tax litigation context. In general, negative freedom of religion has a double meaning: it consists in the right to confess no religion or in the right not to be compelled to disclose one's religious beliefs. It

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[58] Rivers, Julian (2010), *The Law of organized Religions: between Establishment and Secularism* (New York: Oxford University Press Inc), p. 61.

[59] Commission (dec.), *E. v. Austria*, No. 9781/82 (ECHR, 14 May 1984); see also Commission (dec.), *Gottesmann v. Switzerland*, No. 10616/83 (ECHR, 4 December 1984).

[60] *Sukyo Mahikari v. France*, No. 41729/09 (ECHR, 8 January 2013).

appears that, connected to the taxation issue, the applicants complained that they had been led to reveal their religious beliefs while filling in their tax return.

In the *Spampinato v. Italy* case, the applicant had decided to grant the State the eight thousandths of the amount due for income tax. Before the European Court of Human Rights, he complained under Articles 9 and 14 of the Convention that he had been obliged to reveal his religious convictions while drawing up his tax return. The Court rejected the argument, saying that the choice of assignment of income tax would necessarily involve revealing one's belonging to a religious denomination. Indeed, the Court observes that, pursuant to Article 47 § 3 of Act No. 222 of 1985 – pertaining to the 0.8 per cent system – taxpayers can express their choice as to the assignment of sums thus perceived. In the *Wasmuth v. Germany* case,[61] the tax return was at issue against the backdrop of the German tax system. For some years, the applicant's wage tax cards had included a section 'Church Tax deducted', which was left blank, thereby informing his employer that he did not have to deduct any Church Tax for Mr Wasmuth. He unsuccessfully asked the local authorities to provide him with a wage tax card disclosing no information related to his religious belonging. He lodged an appeal with various German courts arguing that this refusal amounted to a breach of his right not to disclose his religious opinions. The European Court concluded that there had not been a violation of Article 9 – notably for two reasons. As to whether the interference had been proportionate to the legitimate aim of ensuring the right of Churches and religious societies to levy religious tax, the European Court followed the German jurisdictions in thinking that the reference to the applicant's religious or philosophical beliefs on the wage tax card had limited influence. Indeed, it only indicated to the fiscal authorities that he did not belong to one of the six churches of religious communities that can levy tax. In addition, the tax card is not publicly used and has no utility outside the relationship between employee and fiscal authorities.

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[61] *Wasmuth v. Germany*, No. 12884/03 (ECHR, 17 February 2011).

All this contributes to ensuring stability for the state support issue within the premises of systems of Church–State relationships.

Impregnable Tax Sovereignty?

The main statement likely to sum up the European Court's position here is that freedom of religion has limited impact on tax legislation enforcement, be it general and neutral legislation or religion-oriented tax legislation on the one hand, or positive or negative freedom of religion on the other hand. Indeed, the Strasbourg Court case law seemingly reflects the principle, according to which 'tax sovereignty is a fundamental part of national sovereignty'.[62] Before the European Court of Human Rights, this results in a wide margin of appreciation generally granted to Member States in deciding upon tax matters and the limited room granted to the principle of discrimination.

A wide margin of appreciation, the pillar of tax sovereignty

In general, and like other European Union institutions, the Strasbourg Court is very cautious about evolving within the context of Church–State relationships.[63] Although freedom of religion undeniably benefits from protection through the enforcement of the European Convention by the Court, Member States nevertheless have an important margin of appreciation justified by the specificity of their relationships with Churches and religious groups.

A historical inheritance, these relationships reflect a part of the deep identity of the States and lead to the subsidiarity of European systems. This is all the more visible when it comes to the tax system applicable to religious groups. The unchanged position of the European Court

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[62] Terra, Ben J.M. and Wattel, Peter J. (2005), *European Tax Law* (The Hague: Kluwer Law International), p. 3.

[63] In the relevant law section, it refers to Article 17 § 1 of the Treaty on the Functioning of the European Union, which provides that: 'the Union respects and does not prejudice the status under national law of churches and associations or communities in the Member States'.

is summarized in the decision *José Alujer Fernandez and Rosa Caballero Garcia c. Espagne*:[64] 'such a margin of appreciation is all the more warranted in that there is no common European standard governing the financing of churches or religions, such questions being closely related to the history and traditions of each country.' The Court has us understand that it does not intend to intrude into this exclusive domain of the States. Among several examples, the dissenting opinion of judges Berro-Lefèvre and Kalaydjieva following the case *Wasmuth v. Germany* should be considered here. Their criticism focuses on the analysis of negative freedom of religion adopted by the Court and they go to the trouble of expressing their adhesion to 'the financing of churches as existing in Germany "and their" possibility to levy the Church Tax' that 'it is out of their purpose to question'.

It seems that the freedom granted to the States when it comes to taxation questions is added to the traditional margin of appreciation usually left to the domestic authorities in religious matters. In the *Spampinato* case, the Court openly justifies the eventual solution by referring to its overall case law on state economical and tax policies.[65]

Such rooting in history is especially tangible when the Court is led to go into the details of Church–State relationship systems. In several countries, historically dominant Churches are in charge of social tasks pertaining to the general interest or public good. In this regard, litigation brought before the Strasbourg judges shows how the borders between the civil or religious nature of these tasks prove difficult to establish. The tasks thus carried out directly or indirectly benefit all citizens, regardless of their religious beliefs. In the *Bruno v. Sweden*

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[64] Commission (dec.), *Alujer Fernández and Caballero Garcia v. Espagne*, No. 53072/99 (ECHR, 14 June 2001); see also Court (dec.), *Spampinato v. Italy*, No. 23123/04 (ECHR, 29 March 2007).

[65] *Gasus Dosier – und Fördertechnik GmbH v. Netherlands*, No. 306–B, series A, p. 49 (ECHR, 23 February 1995), § 60; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom*, coll. 1997–VII (ECHR of 23 October 1997), § 80–2.

case, 'the Court agrees with the Government that the administration of burials, the care and maintenance of Church property and buildings of historic value and the care of old population records can reasonably be considered as tasks of a non-religious nature which are performed in the interest of society as a whole. It must be left to the State to decide who should be entrusted with the responsibility of carrying out these tasks and how they should be financed'.[66] In the same vein, the *Iglesia Bautista 'El Salvador' and José Aquilino Ortega Moratilla v. Spain* case justifies the differential treatment between the Catholic Church and other denominations on the grounds that the Catholic Church is entrusted with specific missions like the maintenance of cultural heritage, in the knowledge that 'the Catholic Church has undertaken to place its historical, artistic and documentary heritage at the service of the Spanish people'.

This case law allows a great stability of the domestic tax system. But the diversity of the status granted to religious denominations in various national Church–State relationship systems in Europe logically leads us to consider the discrimination argument, which very often form the basis of applicants' claims before the Court.

Impregnable case law? Power of taxation v. discrimination

The question arises of whether this case law could remain apart from the now well-established trend impacting all the European Union Member States, which consists in questioning of the current systems of state support for religious groups and activities in the light of the requirements of equality of treatment and the related principle of non-discrimination. Indeed, the contemporary religious landscape is characterized by neutrality and pluralism, leading the States to the dilemma of funding no or all denominations to avoid discrimination on religious grounds. Will the principle of non-discrimination challenge the Strasbourg Court's position on these premises? Or will the Court maintain the disconnection

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[66] Court (dec.), *Bruno v. Sweden*, No. 32196/96 (ECHR, 28 August 2001).

between its case law on discrimination between religious denominations and its position regarding tax applied to individuals and denominational groups?

In general, the position of the Court on the principle of non-discrimination rests on Article 14 and consists in considering that 'this provision does not prohibit all differences in treatment in the exercise of the rights and freedoms recognized, equality of treatment being violated only where the difference in treatment has no objective and reasonable justification' (a reference to ECHR, Belgian linguistic judgment of 9 February 1967). Hence, on the one hand, as noted above, the Court is much more attentive to the discrimination issue when it applies to religious denominations prevented from benefiting from the advantages normally granted to already established religious groups or from acceding to the same legal status as exists for them.[67] On the other hand, very little room, if any, is given to the discrimination parameter in the case law under study here. Indeed, one observes that very regularly not only Article 9 is invoked but also Article 14, related to discrimination, taken together with Article 1 of Protocol No. 1. The Strasbourg Court regularly, if not systematically, opposes the very important margin of appreciation allotted to the Member States in this respect. Its position is clearly expressed in the *Alujer Fernandez v. Spain* case: 'Regard being had to the margin of appreciation left to Contracting States […] particularly as regards the building the fragile relations that exist between the State and religions, it cannot be considered as amounting to discriminatory interference with the applicants' right to freedom of religion'. However, as noted above, within the sample under study here, three cases conclude that there was a violation of the Convention: *Darby v. Sweden* (1990), *Jehovah's witnesses v. France* (2011) and *Association Cultuelle du Temple Pyramide v. France* (31 January 2013). In the *Darby* case, the Court precisely concludes that there was a violation of Article 14 combined with

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[67] See cases *Lang v. Austria*, No. 28648/03 (ECHR, 12 March 2009), *Gütl v. Austria*, No. 49686/99 (ECHR, 12 March 2009) and *Löffelman v. Austria*, No. 42967/98 (ECHR, 12 March 2009).

Article 1 Protocol No. 1, but without carrying out a real examination of the claim under Article 9. In addition, the violation relies on a lack of legitimate aim pursued by the Swedish legislation, the scope of which is very limited. Moreover, it should be noted that, in the *Jehovah's witnesses v. France* case, the claim relating to discrimination had been overturned at the admissibility stage. Lastly, the range of French cases of January 2013 does not allow comparison, since the discrimination issue was not dealt with.[68]

The case *Jehovas Zeugen in Österreich v. Austria*[69] could announce a less clement position adopted by the Court towards the Member States, as it paves the way to a link between non-discrimination requirements and tax law. The applicant was granted the status of religious society under the Religious Communities Act in May 2009. It claimed that before this date, as a mere religious community, it had been subject to laws concerning employees and tax from which it would have been exempt, had it been a recognized religious society and treated accordingly. In particular, it could have been exempt from inheritance and gift tax for a donation made to it in 1999. On this point, it invoked Article 14 and Article 1 of Protocol No. 1. The Court deemed that there had been a violation of these provisions. The reason very likely lies in the fact that 'the Government has not given any reason justifying the difference in treatment regarding the liability to inheritance and gift tax between the applicant community and religious communities recognized as religious societies and merely indicated that inheritance and gift tax had ceased to be collected after 31 July 2008' (§ 47). Hence, the Court could only but apply the reasoning according to which a difference in treatment

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[68] Besides the case of *Association Cultuelle du Temple Pyramide v. France*, the Court delivered judgments on two other cases on a similar issue and with identical solutions; case *Association des Chevaliers du Lotus d'or v. France*, No. 50615/07 (ECHR, 31 January 2013), case *Église Évangélique Missionnaire and Salaûn v. France*, No. 25502/07 (ECHR, 31 January 2013).

[69] *Jehovas Zeugen in Österreich v. Austria*, No. 27540/05 (ECHR, 25 September 2012).

between two religious groups cannot only depend on 'whether or not the applicant community was a recognized religious society' (§ 35–7 and 47–9).

The question remains open about how these cases are likely to determine the orientation the Court has adopted so far. Should the Court follow this pathway, the consequences for the States could be serious.

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